

**CITY OF EL PASO, TEXAS
DEPARTMENT HEAD'S SUMMARY REQUEST FOR COUNCIL
ACTION (RCA)**

DEPARTMENT: City Attorney's Office

AGENDA DATE: July 19, 2005

CONTACT PERSON/PHONE: Joyce Wilson, City Manager; 915-541-4109

DISTRICT(S) AFFECTED: All

SUBJECT:

APPROVE the reinstatement of Charlie F. McNabb into City service as the City Attorney and that the City Manager be authorized to sign an Employment Agreement between the City and Charles F. McNabb setting forth the terms of the employment, a copy of which is attached hereto as Exhibit "A."

BACKGROUND / DISCUSSION:

Mr. McNabb has the experience and knowledge to carry out the duties of the City Attorney.

PRIOR COUNCIL ACTION:

Has the Council previously considered this item or a closely related one? If so, when?
Yes. On June 21, 2005, Charlie McNabb was appointed as Interim City Attorney.

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

This is a budgeted item.

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

*******REQUIRED AUTHORIZATION*******

LEGAL: (if required) _____

FINANCE: (if required)

OTHER:

(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That Council affirm the Mayor's reinstatement of Charlie F. McNabb into City service as the City Attorney and that the City Manager be authorized to sign an Employment Agreement between the City and Charles F. McNabb setting forth the terms of the employment, a copy of which is attached hereto as Exhibit "A."

APPROVED this 19th day of July 2005.

THE CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

Approved as to form:



Guadalupe Cuellar
Assistant City Attorney

EMPLOYMENT AGREEMENT

THIS AGREEMENT ("Agreement"), made and entered into by and between the CITY OF EL PASO, TEXAS ("City"), a municipal corporation chartered under the Constitution and Laws of the State of Texas as a Home-Rule city, and Charles F. McNabb.

WITNESSETH

WHEREAS, the City desires to appoint Charles F. McNabb, as City Attorney hereinafter referred to as "Attorney" of the City of El Paso, Texas, as provided by the Charter of the city of El Paso, Texas ("Charter")' and

WHEREAS, it is the desire of the Council of the City of El Paso, ("Council") to provide certain benefits, establish certain conditions of employment, and to set certain working conditions for the Attorney; and

WHEREAS, Charles F. McNabb desires to accept the appointment as City Attorney under the terms outlined herein;

NOW THEREFORE, the parties hereto agree as follows:

SECTION 1. Duties.

The City hereby agrees to appoint Charles F. McNabb as City Attorney to perform the functions and duties specified in the Charter and to perform such other duties and functions as the Council shall from time to time assign, assuming he is willing and able to perform such duties.

In addition to the agreement contained in this paragraph, Attorney agrees to abide by the City's ethics ordinance.

SECTION 2. Term.

A. The term of this Agreement is for a period of five years beginning July 19, 2005. Unless Council notifies the Attorney that Council intends not to renew the Agreement 120 days prior to the expiration of the initial term, Agreement will automatically renew for a one-year term.

After the expiration of the one-year term, this Agreement will automatically renew on a year to year basis for subsequent one year terms unless Council notifies the Attorney 60 days prior to the expiration of any subsequent term that it intends not to renew the Agreement, and in such event the Agreement shall terminate at the expiration of the term. This Agreement for the Attorney's appointment herein shall remain and all times be subject to Section 3.7 of the Charter of the City of El Paso, Texas.

B. Nothing in this Agreement is intended, nor shall same be construed, to in any way create a definite term for the Attorney's appointment as City Attorney, nor to in any way abridge the authority of the Mayor and Council granted under Section 3.7 of the City Charter.

C. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the Mayor and Council to terminate the Attorney at any time at the will of the Mayor and Council, in accordance with the Charter, subject only to specific provisions set forth in this Agreement.

D. Nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of the Attorney to resign at any time from his position with the City, subject only to the specific provisions of this Agreement.

SECTION 3. Termination and Severance Pay.

A. Subject to Paragraph B of this Section 3, in the event the Attorney is terminated by the City Council within eighteen (18) months after the effective date of the initial term and during such time the Attorney is willing and able to perform his duties of City Attorney, the City agrees to pay Attorney a lump sum payment ("severance payment") in an amount equal to twelve (12) months salary at his then current base salary. In the event the Attorney is terminated by the City Council (18) months after the effective date of the initial term and during such time the Attorney is willing and able to perform his duties of City Attorney the City agrees to pay Attorney a lump sum payment ("severance payment") in an amount equal to six (6) months salary at his then current base salary. Payment by City of such lump sum payment, and any accrued vacation or sick leave owing in accordance with the terms of this Agreement, shall be deemed and constitute a full, complete and final acquittance to the Attorney.

B. In the event the Attorney is terminated "with cause," or resigns his position as City Attorney before expiration of the initial term, the City shall have no obligation to pay the cash severance payment designated in Paragraph A of this Section. The term "with cause" shall mean:

1. Any willful, knowing, grossly negligent, or negligent breach, disregard or habitual neglect of any provision of this Agreement, or any willful, knowing, grossly negligent, or negligent breach, disregard or habitual neglect of any duty or obligation required to be performed by Attorney under this Agreement or under the Charter and ordinances of the City and/or the laws of the United States of the State of Texas or any willful, knowing, grossly negligent, or negligent breach, disregard or neglect of any lawful duties directed to or requested of Attorney by the City Council.

2. Any conviction of Attorney involving an act of moral turpitude, criminal illegality (excepting minor traffic violations), or habitual violations of the traffic laws, whether or not related to his official duties hereunder.
3. Any willful, knowing, grossly negligent, or negligent misapplication or misuse, direct or indirect, by Attorney of public or other funds or property, by Attorney.

C. In the event the Attorney voluntarily resigns his position with the City, then Attorney shall give the City thirty (30) days written notice in advance of the effective date of such resignation, unless both parties agree otherwise. If Attorney resigns prior to the expiration of the initial term, the Attorney shall be required to reimburse the City the amount the City spent on relocation costs. If the Attorney voluntarily resigns and provides thirty days written notice, he shall be entitled to payment for any accrued sick or vacation leave. In the absence of the thirty (30) days written notice, Attorney shall NOT be paid any remuneration of any kind or nature, accrued or otherwise, including accrued sick leave, vacation,, or car allowance.

D. The City shall not at any time during the term, reduce the salary, compensation, or other financial benefits of the Attorney, except to the degree of such a reduction across-the-board for all employees of the City. In the event the City violates this Section 3D of this Agreement and upon thirty days written notice from Attorney to the City, the city fails or refuses to honor any other valid, applicable and enforceable provision benefiting Attorney herein, Attorney may, at his option, be deemed to be "terminated" as of the date of such reduction or such failure/refusal. Should the Attorney elect this option, he shall send written notice to the City.

SECTION 4. Salary.

A. Starting from date this Agreement is approved by Council, the City agrees to pay for his services rendered pursuant hereto, an annual base salary of \$157,500.00 payable in installments at the same time and in the same general manner as other employees of the City are paid. The Attorney may be eligible for an annual merit increase of five percent of his base salary. The merit increase may be given if he receives an "exceeds standard" rating on his annual performance evaluation. In addition to this base salary, the Attorney shall be entitled to the following benefits:

1. Contribution to a Deferred Compensation Plan. The maximum amount allowable by law, not to exceed ten thousand dollars (\$10,000.00), payable in bi-weekly installments based on paragraph "A" above.
2. Payment of relocation expenses and a temporary housing allowance not to exceed \$10,000.00. Attorney will provide three estimates for relocation expenses. The City's payment of

relocation expenses will be based on the lowest estimate Relocation expenses in excess of \$10,000.00 must be approved by City Council.

3. Vacation and sick leave shall be credited with a beginning balance of one week vacation and one week sick leave. Thereafter, accrual of vacation and sick leave will be in accordance with City of El Paso Civil Service Rules and Procedures as they apply to reinstated employees.
4. The City's Insurance Plans. Enrollment in accordance with the provisions of those Plans as they may be amended from time to time. After Attorney's employment with the City is terminated, Attorney may elect to continue in the City's Insurance Plan as a retiree.
5. The City's Pension Plan. In accordance with the provisions of the Plan. Election to participate in the City's Pension Plan must be made at the time of signing of this Agreement. Attorney elects not to participate in the City's Pension Plan.
6. The Attorney duties require that he shall have the exclusive and unrestricted use of an appropriate motor vehicle. The City agrees to pay Attorney, the sum of \$350.00 per month, as vehicle allowance, beginning the month in which the City first pays salary to the Attorney under this Agreement. The monthly allowance shall be payable with the first paycheck of each month following the month for which the payment is due. The Attorney shall acquire and maintain a suitable motor vehicle during the term of this Agreement, which shall be available for Attorney's exclusive and unrestricted use in the performance of his duties hereunder. Attorney shall be responsible for paying all liability, property damage and comprehensive insurance coverage upon such motor vehicle and shall further be responsible for all expenses attendant to the purchase operation, maintenance, repair and regular replacement of said motor vehicle. The vehicle may be used by the Attorney for his own personal use. The monthly vehicle allowance shall be prorated to the effective date of any resignation or termination of the Attorney. It is understood and agreed that such car allowance shall be paid by City to Attorney in full compliance with the Federal Internal Revenue Code, as it may from time to time be amended or succeeded, and under current law is subject to income tax withholding and FICA taxes.

The City will provide no other fringe benefits; however, additional employee benefits may be provided in accordance with Section 8 of this Agreement. Employee

agrees that he at no time will make a claim against the City for more than what is provided under the terms of this Agreement.

SECTION 5. Performance Evaluation.

The Council shall review and evaluate the performance of the Attorney at least once annually in advance of the adoption of the annual operating budget. The Mayor, with input from the City Manager, will have the responsibility of completing the performance evaluation recommendation and submitting the proposed performance evaluation to City Council for approval.

SECTION 6. Disability.

During the term of this Agreement, if Attorney is permanently disabled or is otherwise unable to perform his duties because of sickness, accident, injury, mental incapacity or health for a period of four (4) successive weeks beyond any accrued and/or other sick leave properly credited to his account, the City may terminate this Agreement, and the Attorney shall be compensated for any accrued sick leave, vacation and other regular accrued benefits, if any. Furthermore, the severance pay provisions as contained in Section 3(A) of this Agreement shall not apply.

SECTION 7. Hours of Work.

It is agreed and understood that Attorney is an exempt employee expected to engage in those hours of work which are necessary to fulfill the obligations of the City Attorney position, and therefore does not have designated hours of work and is available at all times. Attorney acknowledges that the proper performance of duties as chief administrative officer and executive officer of the City will often require the performance of necessary services at times and for extended periods outside the normal work hours. Attorney agrees to devote the normal work hours to his official duties of office, and such additional time as may be reasonably necessary for the full and proper performance of his duties hereunder, and that the compensation herein provided includes compensation for the performance of all services.

SECTION 8. Dues and Subscriptions and Professional Development

A. The city encourages Attorney to participate in professional associations and agrees to budget and pay for all professional dues and subscriptions of the which are reasonably necessary for his participation in national, regional, state, and local associations and organizations and which are necessary and desirable for his continued professional development participation, growth and advancement and for the good of the City as shall be specifically determined in advance by the City council in its absolute discretion. All such expenses shall be approved in advance by the City Council. Any expense incurred by Attorney in violation of this Paragraph shall be at Attorney's expense, and Attorney shall immediately reimburse the City for any such unauthorized expense.

B. The City agrees to budget and to pay for reasonable travel and related expenses permitted under the City's travel policy for reasonable professional and official travel, meetings and occasions reasonably necessary to continue the professional development of Attorney limited to the Texas Municipal League, International City Attorney Association, and such other governmental groups and committees of which the Attorney serves as a member, all as shall be approved in advance by the City Council. Any expense incurred by Attorney in violation of this Paragraph shall be at Attorney's expense, and Attorney shall immediately reimburse the City for any such unauthorized expense. The Attorney is not required to obtain prior approval for non-overnight travel and expenses otherwise budgeted; provided however, Attorney account to the City Council for such non-overnight travel and or related expenses exceeding \$100.00 at the first regular Council meeting immediately following the month in which such expenses were incurred.

B. The City agrees to budget and pay for the travel and related expenses as permitted under City's travel policy expenses of Attorney for short courses, institutes and seminars that are reasonably necessary for this professional development and for the good of the City, all as shall be determined in advance by the City Council. Any expense incurred by Attorney in violation of this paragraph shall be at Attorney expense, and Attorney shall immediately reimburse the City for any such unauthorized expense.

SECTION 9. Outside Employment and Investments.

Attorney acknowledges that Attorney shall devote his full time and effort to performance of the duties required hereunder and shall not undertake, nor accept, any outside or other employment. It is further understood and agreed that because of the duties of Attorney within and on behalf of the City and its citizenry, Attorney shall not without the prior written consent of Council, individually, as a partner, joint venture, officer or shareholder, invest or participate in any business venture conducting business in the corporate limits of the City of El Paso, except as to stock ownership in any company whose capital stock is publicly held and regularly traded on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ. Attorney further agrees, except for Attorney's personal residence or residential property acquired or held for future use as Attorney's personal residence, not to invest, in any other real estate or property improvements within the corporate limits of the City of El Paso.

SECTION 10. Residence.

Attorney shall maintain his permanent residence within the corporate City limits of the City during the term of this Agreement.

SECTION 11. Other Terms and Conditions of Employment.

The city Council shall fix such other terms and conditions of employment, as it may determine from time to time, relating to the performance of Attorney, provided such

terms and conditions are not inconsistent with or in conflict with the provisions of this Agreement, the City Charter, or any other law.

SECTION 12. General Provisions.

A. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties. This Agreement contains the entire agreement of the parties.

B. If any provision of this Agreement is held by a court to be invalid, void, or unenforceable, the remaining provisions will continue in full force and effect without being impaired or invalidated in any way.

C. The waiver by one party of any breach of this Agreement by the other party will not be deemed a waiver of any other provisions of this Agreement.

D. Except as otherwise specifically provided herein, this Agreement may be amended or modified only by written instrument signed by both Attorney and Council and dated subsequent to the effective date hereof.

E. Any notice to be given under this Agreement by either party to the other must be in writing and may be effected by registered or certified mail, return receipt. Notice to City will be sufficient if made or addressed to the following:

City of El Paso
ATTN: Mayor
#2 Civic Center Plaza
El Paso, Texas 79902

Notice to Attorney will be sufficient if made or addressed to the following:

Charles McNabb

or may be hand-delivered to the Attorney.

F. This Agreement shall be governed by, and shall be construed in accordance with, the laws of the State of Texas.

G. Reasonable attorney's fees and expenses of a party incurred in successfully prosecuting or defending a suit under this Agreement against the other party will be recoverable by the successful party in such action.

H. All rights, duties, and obligations under this Agreement are payable and enforceable in El Paso County, Texas. In the event of a dispute arising hereunder, venue shall be set in an applicable state court located in El Paso County, Texas.


IN WITNESS WHEREOF the parties have executed this Agreement at El Paso, Texas this 19th day of July, 2005.

CITY OF EL PASO

Joyce A. Wilson
City Manager

ATTEST:

Richarda Duffy Momsen
City Clerk



Charles F. McNabb
Contractor

APPROVED AS TO FORM:



Lupe Cuellar, Assistant City Attorney

APPROVED AS TO CONTENT:

Joyce A. Wilson, City Manager